United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

76-7172

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

WALTER J. MEYER,

Plaintiff-Appellant,

—against—

LOUIS FRANK, Commissioner of Police, Nassau County Police Department, and CHRISTOPHER QUINN, Trial Commissioner and Inspector, Nassau County Police Department,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF APPELLEES AND SUPPLEMENTAL APPENDIX

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BRIEF ON BEHALF OF APPELLEES AND SUPPLEMENTAL APPENDIX

This is an appeal from an order of the District Court, Eastern District of New York (Constantino, J.), dismissing the plaintiff's Civil Rights Act suit on the grounds that the suit is barred by the statute of limitation.

The Case

The plaintiff-appellant was a detective in the Nassau County Police Department when, on June 25, 1970, he was indicted by a Nassau County Grand Jury (with another detective) for an attempt to commit the crime of grand

larceny, first degree (A. 14).* On the same day he was suspended by the Police Department.

On July 2, 1970, appellant was charged with a violation of Police Department rules (A. 15) relating to the incident charged in the indictment.

The administrative hearing originally scheduled for November 30, 1970, was adjourned, at appellant's request, to January 6, 1971, January 27, 1971, February 24, 1971, April 8, 1971, on grounds of counsel's actual engagement. From April 8th, the hearing was adjourned to April 22, 1971, at appellees' request due to the Easter holiday season (A. 6).

On April 22, 1971, appellant, with the other charged detective, appeared before the appellee Quinn with James Moffatt, Esq. Mr. Moffatt requested a further adjournment on behalf of John Sutter, Esq., appellant's retained counsel. The sole ground asserted at the hearing, as we read the original petition in the State Court, was the unavailability of John Sutter, Esq. on the day of the hearing. Appellee Quinn refused to grant an adjournment—appellee Quinn advised appellant and the other detective that it was not necessary for them to answer questions "yes" or "no", but that they could remain mute (original petition, ¶10). This they did on advice of Mr. Moffatt (A. 20). After the taking of testimony, the County rested. Appellee Quinn gave appellant and the other detective the opportunity to make a statement (A. 55). They remained mute. Appellee Quinn then adjourned the hearing to April 27th, making the following statement (A. 56):

> "Trial Commissioner: If you wish at that time, you can bring in any evidence you wish to controvert what

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* (A.) refers to page numbers in the Appendix, unless otherwise indicated.

has been presented, any witnesses that you want to present. If your attorney wishes to come at this time or any attorney to represent you in this part of the case, you may do so. If any of the witnesses that have appeared today you wish to subpena, if you will notify Deputy Chief Inspector Looney of the Training Division, we will attempt to subpena the witnesses for you.

"Has anybody anything else that they would like to bring before this hearing today before the adjournment? Mr. Meltzer?

"Mr. Meltzer: No.

"Trial Commissioner: Gentlemen?

"The Respondents: No response.

"Trial Commissioner: We are adjourning until 10:00 a.m. on April 27th when we will have this hearing. We will start it and if you have anything to offer, we will accept it.

"This hearing is adjourned."

Appellant at this time sought a writ of prohibition in Supreme Court, Mineola, which was denied by Hon. Bernard S. Meyer on April 27, 1971 (A. 17).

On April 27, 1971, appellant and the other detective appeared at the hearing, and both again remained mute on advice of Mr. Sutter. The hearing continued and was concluded. On June 4, 1971, appellant and the other detective were dismissed from the Nassau County Police Department. Appellant and the other officer commenced an Article 78 proceeding in Supreme Court, Nassau County. On July 15, 1971, the petition was dismissed on the merits (A. 19, *et seq.*). (Appellant's original application is annexed hereto.) In January 1972, appellant and his co-defendant were tried on the indictment, and on January 14th, both were acquitted.

The judgment in the Article 78 proceeding was affirmed on October 10, 1972, by the Appellate Division, Second Department, and a motion to reargue was denied on January 19, 1973. In July of 1973, leave to appeal to the Court of Appeals was denied. On January 15, 1974, appellant sought a rehearing from the appellee Police Commissioner. On April 9, 1974, appellant was notified that his request would not be considered. On June 6, 1975, appellant commenced an action in the United States District Court for the Eastern District pursuant to 42 U.S.C. 1981, 1983. Appellant's petition asserts violations of his constitutional rights, and more specifically, a violation of his Fifth Amendment right not to be compelled to give testimony which could be used in a criminal prosecution.

Appellees moved to dismiss the complaint on a number of grounds, including the statute of limitations. On March 11, 1976, the District Court granted the motion to dismiss on that ground (A. 32), 409 F.Supp. 1240.

POINT I.

The action is barred by the statute of limitations.

Appellant was dismissed from the Nassau County Police Department on June 4, 1971; his Civil Rights Act suit was commenced on June 6, 1975.

It is clear that where Congress sets no statute of limitations to govern suits created by federal statute, the State statute of limitations applicable to the most similar State cause is "borrowed" by the Federal Court. (*U.A.W.* v. *Hoosier Corporation*, 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed. 2d 192 [1966]; *Swan* v. *Board of Education*, 319 F.2d 56 [2d Cir. 1963])

This principle is applicable to Civil Rights Act suits (*Johnson* v. *Railway Express Agency*, 421 U.S. 454, 44

L.Ed.2d 295 [1975].) The applicable New York statute is set forth in Section 214 of the New York Civil Practice Law and Rules, relating to actions where liability is created or imposed by statute (*Ortiz* v. *LaVallee*, 442 F.2d 912 [2d Cir. 1971]; *Romer* v. *Leary*, 425 F.2d 186 [2d Cir. 1970]). Said CPLR § 214 sets a limitation period of three years.

Appellant seeks to avoid the three-year statute by asking this Court to formulate a federal tolling policy where a state suit precedes the institution of a federal Civil Rights Act suit. Appellant alleges that his state suit was entirely on state grounds, and not on federal constitutional grounds. We do not read the original petition to limit his action to state grounds. (See Point II herein.) In any event, even assuming a prior state court action on state grounds, a federal tolling provision would not be appropriate.

The tolling of a statute of limitations usually relates to disability of plaintiff (CPLR §208, *Ortiz* v. *LaVallee*, *supra*) or some bad faith conduct on the part of defendant (*Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231, 3 L.Ed. 2d 770, 79 S.Ct. 760 [1959]; *Holmberg* v. *Ambrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed.2d 743 [1946]). *Cf.*, *Chevron Oil Inc.* v. *Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971); *Movie Color Ltd.* v. *Eastman Kodak Co.*, 288 F.2d 80 [2d Cir. 1961]. There is no such factor in the case at bar.

Appellant's cause accrued on the day he was dismissed, just as the plaintiff's in *Johnson*, *supra*. At that time, there were no rules which would have *prevented* a Civil Rights Act suit. No condition precedent exists in the Civil Rights Act to the institution of suit immediately upon an alleged deprivation. Certainly a suit at that time would have survived a motion to dismiss on any exhaustion of remedies theory.

The institution of a Civil Rights Act suit is not dependent on an exhaustion of state judicial remedies (*Monroe* v.

Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 [1961]), or any state administrative remedies (*McNeese* v. *Board of Education*, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 [1963]).

As the Court said in *Monroe* v. *Pape, supra*:

> "The Federal remedy is supplemental to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." 365 U.S. at 183, 16 L.Ed.2d at 503.

Lombard v. *Board of Education*, 502 F.2d 631 (2d Cir. 1974), does not create a tolling provision; it affirms the right of a litigant to bifurcate his action if he so chooses and to bring his state cause in the state tribunal and his civil rights case in Federal Court. *Lombard* does not expressly or by inference provide either a tolling policy or an accrual delay in the federal court. If a plaintiff seeks to advance a state court action on state grounds and a federal cause on civil rights in the federal court, he must comply with the procedural rules applicable to each cause. *Johnson* v. *REA, supra.*

Appellant relies essentially on two judicial theories to advocate his position. The *Mizell* case (*Mizell* v. *North Borword Hosp. District*, 427 F.2d 468 [5th Cir. 1970]) enunciated a theory in the Fifth Circuit concerning federal tolling. *Mizell*, as its author, Judge Tuttle asserted in his dissent in *Blair* (*Blair* v. *Page Aircraft Maintenance Co.*, 467 F.2d 815 [5th Cir. 1972]), was reversed by *Blair sub silentio* by failure to apply its rule.

In *Ammlung* v. *City of Chester*, 494 F.2d 811 (3d Cir. 1974), the *Mizell* principle was rejected as follows:

> "Furthermore, given the absence of a federal limitation period in the Civil Rights Act, the Court has no basis

for fashioning federal tolling principles, and due regard for our system of federalism requires that state concepts of tolling be applied to state statutes of limitation." At 816.

This principle also distinguishes appellant's second contention, *i.e., Burnett* v. *N.Y. Central,* 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965). *Burnett* was a case based on a federal limitation statute and not, like here, an application of a state statute.

As the Court below determined, the *Johnson* case *(Johnson* v. *REA, supra),* is most analogous to the case at bar. The Court had before it a litigant who commenced two federal suits—one a Title VII action commenced by an administrative complaint to the EEOC, and the other a Civil Rights Act suit which the Court held to be governed by a one year Tennessee statute. The Court refused to toll the statute because of the EEOC complaint. The Court specifically took note (at footnote 11) of the "significant delays that have attended administrative proceedings in the EEOC."

Like *Johnson,* appellant's two remedies were entirely independent and unlike *Johnson,* as the dissent points out, here, if appellant's §1983 suit is truly new, the appellees had no notice of appellant's 1983 claim prior to the running of the statute.

It is respectfully submitted that the rule enunciated in *Johnson, supra,* is controlling here and appellant's action is time barred.

As we read the record, the appellant was discharged from the Police Department on June 4, 1971, and in his state suit, leave to appeal to the Court of Appeals was denied in July of 1973. Ample time was left within the

three year statute to come to the federal court, but no action was filed until June 6, 1975. Appellant had from July of 1973 to June 4, 1974, to bring his suit within the three year period. He did not. His action is now time barred.

POINT II.

Appellant's fully litigated attack in the State Court on constitutional grounds precludes him from relitigating the same issues in the Federal courts; appellant's assertion of a new Fifth Amendment right clearly refuted on this record does not alter the effect of the *res judicata* rule.

Appellant's original petition annexed to this brief as a supplemental appendix delineates the original grounds brought by appellant to the state courts.

Clearly, the original petition makes no express reservation of federal constitutional issues, nor, as we read it, does it hesitate to raise substantial constitutional grounds.

Paragraphs 16, 17, 21, 22 and the prayer for relief of the original petition are herewith set forth verbatim:

> "16. That the actions taken by the respondents were unlawful, unreasonable, capricious, arbitrary, and are so outrageous that the same shocks the very foundation of principles of justice and fair play which are mandated by due process of law. That among other things the petitioners have been deprived of their rights to representation by counsel of their own choosing, or any counsel for that matter, in a proceeding which is designed to exact a penalty or forfeiture, to wit, dismissal from their position as police officers of the Police Department of the County of Nassau, and to

deprive them of additional rights such as the fundamental rights of confrontation of witnesses and full and complete cross-examination of them, which is truly the most effective truth finding procedure afforded to an accused in a criminal proceeding or administrative proceeding based upon the same facts and evidence.

"17. That the respondents were without jurisdiction to perform the acts complained of in this petition and the acts the said respondents have taken are in excess of the respondents' jurisdiction and are violative of the applicable provisions of the Constitution of the United States of America and the Constitution of the State of New York.

* * *

"21. That petitioners except, object, and appeal from the recommendations and determinations of said trial Commissioner and the disposition of charges and the determination of the respondent Commissioner of Police aforesaid, and the petitioners respectfully make application to this court to review the recommendations and determinations aforesaid and to annul and vacate the same as a matter of law on the grounds that said hearing and trial of the petitioners was conducted in an arbitrary, capricious, and unreasonable manner, that the recommendations and the determinations aforesaid were illegal, unreasonable, and unnecessary; that the entire proceeding and each and every action taken therein violated the petitioners' Constitutional rights to a fair trial and hearing in accordance with due process of law in that the petitioners were deprived of their right to representation by counsel of their own choosing, the right to be represented by counsel in a hearing and trial in which a penalty or forfeiture was sought to be exacted, namely, dismissal of the peti-

tioners as Policemen; that the petitioners were deprived of their right to confront the witnesses against them, their right to present evidence through counsel, their right to cross-examine adverse witnesses through counsel, all in violation of the rights afforded to the petitioners pursuant to the Constitution of the United States of America and the Constitution of the State of New York.

"22. That the Constitutional rights of the petitioners were otherwise violated in that the respondent and the Police Department of the County of Nassau failed to produce and set forth at said trial and hearing evidence in the possession of the respondent and said Department of Police which was favorable to the petitioners and was exculpatory in nature.

* * *

"WHEREFORE, the petitioners respectfully pray that a judgment be made and entered pursuant to Article 78 of the Civil Practice Law & Rules reviewing the actions of the respondents in conducting said hearing and trial, which said trial and hearing was conducted in violation of the petitioners' Constitutional rights, and upon such review annulling the dismissal of the petitioners from their positions as Policemen and Detectives in the Police Department of the County of Nassau; directing that the petitioners be forthwith reinstated, and that a new hearing and trial be granted to the petitioners."

A constitutional claim, fully litigated without reservation in the state courts, cannot be relitigated in the federal tribunal. Recourse to the Supreme Court is the last resort. (*England* v. *Louisiana Medical Examiners*, 375 U.S. 411, 11 L.Ed2d 440, 84 S.Ct. 461 [1964]; *Meed* v. *Frank*, File

No. 73C-1320, U.S. District Court, E.D.N.Y., *aff'd, no op.*, 506 F.2d 1395 [2d Cir. 1974].)

Appellant seeks to avoid the *res judicata* effect of his state case by alleging a violation of the Fifth Amendment in his Civil Rights Act suit. In his original complaint (¶10), appellant stated:

> "That in the absence of counsel the said trial Commissioner advised the petitioners that it was not necessary for them to answer questions yes or not but that they could remain mute throughout the proceeding."

Appellant's allegation here is refuted by this statement. (*Cf., Baxter* v. *Palmigiano,* —— U.S. ——, 44 L.W. 4487 [1976].) He was not compelled to speak.

Further, while appellant's allegations in his original complaint flow from his request for an adjournment based on unavailability of counsel, the Fifth Amendment ground was never advanced in the disciplinary hearing. Unlike *Lombard* (*Lombard* v. *Board of Education,* 502 F.2d 631, 636), there is no indication that raising the issue before the Trial Commissioner would have been futile. There the *process* was attacked; here a decision not to adjourn a hearing is questioned.

We are asked to presume a violation of appellant's Fifth Amendment rights would have occurred if appellant had participated in the hearing. This we cannot do in the face of the fact pronounced in paragraph 10 of appellant's original petition.

CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

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County Attorney of Nassau County
Attorney for Defendants-Appellees

NATALE C. TEDONE,
Senior Deputy County Attorney,
JOSEPH A. DEMARO,
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KENNETH P. MORELLI,
Law Assistant, on the Brief

SUPPLEMENTAL APPENDIX

PETITION

SUPREME COURT

OF THE STATE OF NEW YORK

COUNTY OF NASSAU

In the Matter of

ROBERT J. CULLINAN and WALTER J. MEYER,

Petitioners,

Reviewing the determination of the Respondent which dismissed Petitioners from their positions as Patrolmen and Detectives and directing their reinstatement and for a new hearing

—against—

LOUIS J. FRANK, COMMISSIONER OF POLICE and INSPECTOR CHRISTOPHER QUINN, TRIAL COMMISSIONER OF THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU,

Respondents.

TO THE SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NASSAU,

Petitioners by BRACKEN & SUTTER, their attorneys, complaining of the respondents alleges:

1. That at all times hereinafter mentioned the petitioners were members of the Police Department of the County of Nassau having been heretofore suspended and subsequently discharged by the respondent Commissioner.

2. That at all times hereinafter mentioned the respondent, Louis J. Frank, was and still is the duly appointed Commissioner of Police in the Police Department of the County of Nassau and the respondent, Inspector Christopher Quinn, was the Trial Commissioner duly appointed to conduct and hear charges preferred against the petitioners by Albert J. Owens, Deputy Chief Inspector of the Detective Division, pursuant to the Rules and Regulations of the Police Department of the County of Nassau, New York.

3. That heretofore, by indictment dated June 25, 1970, indictment number 29638, the Grand Jury of the County of Nassau accused the petitioners with the crime of attempting to commit the crime of Grand Larceny in the first degree. That attached hereto and marked Exhibit A is a copy of said indictment.

4. That thereafter on the 2nd day of July, 1970 the heretofore mentioned Albert J. Owens as Deputy Chief Inspector of the Detective Division of the Police Department preferred charges against the petitioners pursuant to the Rules and Regulations of the Police Department of the County of Nassau, New York, which are promulgated by the Police Commissioner of the County of Nassau complaining and accusing the petitioners with having attempted to commit or commit a violation of certain rules of the Rules and Regulations of the Police Department alleging the same facts and circumstances which are set forth in the indictment against the petitioners. That attached hereto and marked Exhibit B is a copy of the charge and specification against the petitioner Cullinan and a copy of the charge and specification against the petitioner Meyer respectively.

5. That upon the indictment of the petitioners by the Grand Jury of the County of Nassau the petitioners and each of them retained John Joseph Sutter, Esq. of the law firm of Bracken & Sutter, 60 Mineola Boulevard, Mineola, New York, to represent the petitioners in the criminal proceeding against them and in all proceedings arising therefrom.

6. The charges and specifications against the petitioners were scheduled to be heard at a Departmental Trial before the respondent Trial Commissioner on April 22, 1971 in the trial room at Police Headquarters, Mineola, New York.

7. That at said time and place the petitioners appeared and were represented by James R. Moffatt, Esq. of the firm of Bracken & Sutter who appeared on behalf of Mr. Sutter for the purpose of making an application for an adjournment of said Departmental Trial on the grounds that the petitioners' attorney, John Joseph Sutter, was actually engaged in trial before the Honorable David T. Gibbons in the County Court of Nassau County in the case of the People of the State of New York against Robert Shuttleworth. That an affidavit of actual engagement was submitted to the respondent Trial Commissioner confirming Mr. Sutter's engagement. That attached hereto and marked Exhibit C is a copy of the affidavit of Mr. Sutter sworn to the 21st day of April, 1971 which was submitted to the Trial Commissioner.

8. That lengthy colloquy between the Deputy County Attorney, representing the Police Department, and Mr. James R. Moffatt, representing the petitioners, was had and among other things it was stated and pointed out by counsel that:

A. The County Attorney set forth for the record the fact that the Departmental Trial had been scheduled for a hearing on November 30, 1970 and adjourned, at the petitioners' request, to January 6, 1971. That thereafter on January 6, 1971 the Departmental Trial was adjourned, at petitioners' request, to January 27, 1971. That thereafter on January 27, 1971 the Departmental Trial was adjourned to February 24, 1971 at petitioners' request. That thereafter on February 24, 1971 the said Departmental Trial was adjourned to April 8, 1971 at the petitioners' request. That thereafter, due to the holiday season, the said Departmental Trial was adjourned, upon consent, to April 22, 1971.

B. James R. Moffatt appearing for the petitioners' counsel advised the Trial Commissioner, which the Trial Commissioner well knew, that the petitioners' attorney, John Joseph Sutter, had been actually engaged on trial for a period of approximately five months commencing October 18, 1970 in the Supreme Court in the County of New York in the case of the People of the State of New York against James G. Blake, et al. and the respondent Trial Commissioner was further advised that Mr. Sutter's actual engagement in said cause continued until quite recently. The petitioners now have been informed that Mr. Sutter was actually engaged in said criminal trial in New York County until March 19, 1971.

C. That upon information and belief the petitioners' counsel, John Joseph Sutter, would have been prepared to proceed with the Departmental Trial against the petitioners on April 8, 1971 but for the fact that the petitioners' counsel was ordered to proceed to trial

by the Honorable David T. Gibbons on April 5, 1971 and the said petitioners' counsel has been continuously engaged before Judge Gibbons in the County Court up to the present time as is averred in Mr. Sutter's affidavit dated April 21, 1971 (Exhibit C).

9. That in spite of the fact that the petitioners' application for an adjournment of the Departmental Trial on the grounds of the petitioners' counsel's actual engagement was concededly made in good faith, the said Trial Commissioner refused to grant an adjournment of said proceeding and ordered the petitioners to remain in the trial room which is located in Police Headquarters, and further stated that the said proceeding would commence and continue to its completion although the said petitioners were not represented by counsel of their own choosing or any counsel whatsoever. That said proceeding commenced in the late morning of April 22, 1971.

10. That in the absence of counsel the said Trial Commissioner advised the petitioners that it was not necessary for them to answer questions yes or no but that they could remain mute throughout the proceeding.

11. That it is respectfully pointed out that the County Attorney representing the Police Department in the Departmental Hearing advised the respondent Trial Commissioner that allegedly the Department's case would be prejudiced by reason of the fact that he was concerned over the availability of two witnesses but the said County Attorney offered to call these two witnesses on his direct case and thereafter to adjourn the proceeding for all purposes including full and complete cross-examination provided, however, that the petitioners assume the responsibility of

securing the attendance of these two witnesses at any adjourned date. That it was pointed out to the respondent Trial Commissioner by the petitioners' counsel, Mr. Moffatt, that only the Trial Commissioner himself had authority to issue subpoenas and traditionally the Police Department cause them to be served, and that further the petitioners would not consent to such a procedure unless it was agreed that no determination would be rendered by the Trial Commissioner until the petitioners actually had the opportunity to fully cross-exam these two witnesses at some future time.

12. That counsel for the petitioners also pointed out that the Police Department's case could in no manner be prejudiced by virtue of the fact that the indictment against the petitioners is pending and that the same witnesses which the Police Department will call in the Departmental Hearing will be the same witnesses used in the criminal proceeding against the petitioners and that, indeed, one of the witnesses which the County Attorney stated may not be available at a future date is actually under indictment at the present time in Nassau County and that all of these witnesses were amenable to process and production through the cooperation of the Police Department of the County of Nassau and the District Attorney's office of the County of Nassau. Indeed, the second so-called unavailable witness is the witness in chief and the complainant in the criminal proceeding.

13. That said Departmental Trial continued through the afternoon of April 22, 1971 until approximately 4:00 p.m. when the County Attorney allegedly rested his case after testimony by five witnesses, and the said Departmental

Trial was thereafter allegedly adjourned until April 27, 1971 at ten o'clock in the forenoon, at which time the Departmental Trial of the petitioners was marked concluded, notwithstanding the fact that the petitioners were not granted the right to be represented by counsel of their own choosing, and to be represented by counsel in the cross-examination of at least three witnesses against the petitioners, two of whom completely changed their versions of the transactions involved at the eve of the Departmental Trial, and perjured themselves in said Departmental Trial.

14. That your petitioners had cause to have assembled an extensive file relating to the transactions involved in the Departmental Trial, which included taped conversations with the witness-in-chief against the petitioners, which said witness-in-chief attempted on several occasions to shake the petitioners down. The said investigation file also consisted of interviews conducted with the two witnesses who changed their stories at the eleventh hour, which said interviews were conducted by private investigators and the petitioners' counsel, Mr. John Joseph Sutter. That, accordingly, each of the said witnesses' testimony against the petitioners would have been impeached had the petitioners been afforded the opportunity to confront these witnesses and cross-exam them through their attorney, Mr. John Joseph Sutter, who had possession of the petitioners' investigation file and the results of the investigation conducted by private detectives.

15. That upon information and belief the said respondent Trial Commissioner, under the direction and instruction of the respondent Commissioner of Police of Nassau

County, denied the petitioners' request for a reasonable adjournment; denied the petitioners' request to confer with their counsel, John Joseph Sutter; denied the petitioners an opportunity to retain other counsel other than Mr. John Joseph Sutter if they were so inclined; and ordered and directed the said petitioners to remain in the trial room of the Police Headquarters and the said Departmental Trial proceeded against them as set forth aforesaid.

16. That the actions taken by the respondents were unlawful, unreasonable, capricious, arbitrary, and are so outrageous that the same shocks the very foundation of principles of justice and fair play which are mandated by due process of law. That among other things the petitioners have been deprived of their rights to representation by counsel of their own choosing, or any counsel for that matter, in a proceeding which is designed to exact a penalty or forfeiture, to wit, dismissal from their position as police officers of the Police Department of the County of Nassau, and to deprive them of additional rights such as the fundamental rights of confrontation of witnesses and full and complete cross-examination of them, which is truly the most effective truth finding procedure afforded to an accused in a criminal proceeding or administrative proceeding based upon the same facts and evidence.

17. That the respondents were without jurisdiction to perform the acts complained of in this petition and the acts the said respondents have taken are in excess of the respondents' jurisdiction and are violative of the applicable provisions of the Constitution of the United States of America and the Constitution of the State of New York.

18. That no previous application has been made to any court or judge for the relief hereinafter requested except the petitioners, while the alleged Departmental Trial was in progress, obtained an Order To Show Cause which was granted April 23, 1971 by Mr. Justice Meyer with regard to a previous Article 78 proceeding for a judgment of prohibition against the respondents from proceeding to continue to conduct said Departmental Trial in violation of the Constitutional rights of the petitioners and the fundamental concepts of due process of law. That Mr. Justice Meyer dismissed said previous Article 78 proceeding for a judgment of prohibition on the grounds that said proceeding was premature and that the court could not assume, at that time, that the respondents would violate the actual rights of the petitioners but that whether or not said rights have been violated would have to await a final determination within the meaning of the Civil Practice Law & Rules. That attached hereto and marked Exhibit D is a copy of Mr. Justice Meyer's short form Order dated the 27th day of April, 1971.

19. That at the conclusion of said Departmental Trial the respondent Trial Commissioner reserved decision and, upon information and belief, recommended to the respondent Commissioner of Police that the petitioners be dismissed from their positions as Patrolmen and Detectives in the Police Department of the County of Nassau.

20. That thereafter the respondent Commissioner of Police adopted and approved the determination and recommendation of the Trial Commissioner, and on the 4th day of June, 1971 determined an Order that the petitioners be dismissed as Patrolmen in the Police Department, effective

the 4th day of June, 1971. That attached hereto and marked Exhibits E and F respectively is the copy of said determination and disposition of the charges of the respondent Commissioner dated June 4, 1971 and a copy of internal correspondence dated June 4, 1971 in the matter of petitioner Walter J. Meyer. That the petitioner Robert J. Cullinan received a similar notice of determination and internal correspondence from the respondent Commissioner of Police, both of which were dated June 4, 1971.

21. That petitioners except, object, and appeal from the recommendations and determinations of said trial Commissioner and the disposition of charges and the determination of the respondent Commissioner of Police aforesaid, and the petitioners respectfully make application to this court to review the recommendations and determinations aforesaid and to annul and vacate the same as a matter of law on the grounds that said hearing and trial of the petitioners was conducted in an arbitrary, capricious, and unreasonable manner, that the recommendations and the determinations aforesaid were illegal, unreasonable, and unnecessary; that the entire proceeding and each and every action taken therein violated the petitioners' Constitutional rights to a fair trial and hearing in accordance with due process of law in that the petitioners were deprived of their right to representation by counsel of their own choosing, the right to be represented by counsel in a hearing and trial in which a penalty or forfeiture was sought to be exacted, namely, dismissal of the petitioners as Policemen; that the petitioners were deprived of their right to confront the witnesses against them, their right to present evidence through counsel, their right to cross-examine adverse witnesses through counsel, all in violation of the

rights afforded to the petitioners pursuant to the Constitution of the United States of America and the Constitution of the State of New York.

22. That the Constitutional rights of the petitioners were otherwise violated in that the respondent and the Police Department of the County of Nassau failed to produce and set forth at said trial and hearing evidence in the possession of the respondent and said Department of Police which was favorable to the petitioners and was exculpatory in nature.

23. That upon information and belief the respondent Trial Commissioner failed to make any findings of fact to support his determination disposing of the charges against the petitioners except to erroneously state that the "Trial Commissioner having heard the pleadings and proof and evidence of the parties" and as a consequence thereof the decision of the respondent Commissioner of Police is arbitrary, capricious, and illegal and incapable of review as a matter of law.

24. That the recommendations and the determinations of the respondent Trial Commissioner and the determination of the respondent Commissioner of Police were based upon the perjured testimony of three civilian witnesses, two of whom had previously been indicted at the Grand Jury, County of Nassau, as a result of a police investigation conducted by the petitioners; that upon information and belief the testimony of these two witnesses was had upon the said witnesses' understanding that if they lied in said Departmental Hearing and inculpated the petitioners these two witnesses would somehow receive favorable treatment

from law enforcement officials with regard to the prosecution of the indictments pending against them, e.g. How can the petitioners effectively testify against these witnesses and said indictments after their dismissal from the Police Department?

24. That upon information and belief the aforesaid hearing, trial and recommendations were erroneous as a matter of law and that, accordingly, the petitioners seek a judgment of this Court setting aside the recommendations and determinations of the respondents aforesaid and directing that the petitioners are forthwith reinstated pending a new hearing and trial. That the petitioners are not requesting this Court at this time to review the acts and evidence adduced at the Departmental Trial aforesaid in order to determine whether or not there was substantial evidence to support the recommendations and determinations of the respondents, and accordingly the petitioners respectfully request the Court to determine the issues raised in this proceeding as a matter of law without transferring this proceeding to the Appellate Division of the Supreme Court in and for the Second Department. That the relief sought herein by the petitioners from this Court is authorized by Article 78 of the Civil Practice Law & Rules.

25. That no previous application has been made to any Court or judge for the relief sought herein or for any relief except as heretofore set forth; this application is being brought on by means of an Order To Show Cause, an Order to determine the manner and method of service, and for any Order to bring this proceeding on in a shorter period of time than that allowed by ordinary motions.

Petition

WHEREFORE, the petitioners respectfully pray that a judgment be made and entered pursuant to Article 78 of the Civil Practice Law & Rules reviewing the actions of the respondents in conducting said hearing and trial, which said trial and hearing was conducted in violation of the petitioners' Constitutional rights, and upon such review annulling the dismissal of the petitioners from their positions as Policemen and Detectives in the Police Department of the County of Nassau; directing that the petitioners be forthwith reinstated, and that a new hearing and trial be granted to the petitioners.

Dated: Mineola, New York
June 21, 1971

s/ ROBERT J. CULLINAN
Robert J. Cullinan

s/ WALTER J. MEYER
Walter J. Meyer

Petition

STATE OF NEW YORK,
COUNTY OF NASSAU, *ss.:*

ROBERT J. CULLINAN and WALTER J. MEYER, being duly sworn, deposes and says:

That they are the petitioners in the within action; that they have read the foregoing petition and know the contents thereof; that the same is true to deponents' own knowledge, except as to the matter therein stated to be alleged on information and belief, and that as to those matters deponents believe it to be true.

s/ ROBERT J. CULLINAN
Robert J. Cullinan

s/ WALTER J. MEYER
Walter J. Meyer

Sworn to before me this
21st day of June, 1971.

s/ DORIS M. WALBRECKER
Doris M. Walbrecker
Notary Public, State of New York
No. 30-4127210
Qualified in Nassau County
Commission Expires March 31, 1973

SERVICE OF THREE (3) COPIES OF THE WITHIN

Brief IS HEREBY ADMITTED

THIS 11 DAY OF July 1976

David B. Anker by A.G.

Attorney(s) for (Lee.)

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